No. 75-1139

In the Supreme Court of the United States

OCTOBER TERM, 1975

DOMINICK SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Petitioner contends that the evidence was insufficient to establish the offenses charged and that the government attorney who presented the case to the grand jury lacked proper authorization.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of converting union welfare funds to the use of the union general fund, in violation of 18 U.S.C. 664 (counts 4, 5, and 7), converting union general funds to his own use, in violation of 29 U.S.C. 501(c) (count 11), and filing false annual financial reports as to union welfare funds, in violation of 18 U.S.C. 1027 (counts 9 and 10). He was sentenced to concurrent terms of six months' imprisonment to be followed by four and one-half years' probation on each of the six counts and was fined $500 each on counts 4, 5, and 7 and $3,000 each on counts 9, 10, and 11. In an opinion on which we primarily rely, the court of appeals affirmed (Pet. App. B).

The evidence, which is not in dispute, is set forth in the opinion of the court of appeals. It shows that petitioner was the president of Local Union 3108 in New York City and was also the administrator and trustee of the union's welfare fund. The assets of the welfare fund were under the general supervision and control of a board of trustees and were required to be kept separate from the general fund of the union. Petitioner used the welfare fund monies, however, to pay the salary of a union organizer and business agent (Pet. App. 4a, 6a; Tr. 1053-1060, 1372-1395), and on several occasions he willfully diverted certain employers' payments to the welfare fund into the union general fund (Pet. App. 5a; Tr. 136-139, 260-263, 309-319, 511-516, 523-564, 593-600, 638-653, 701-707, 1264-1267). Petitioner also knowingly understated the amount of employee contributions to the union welfare fund in the annual financial report he was required to file as administrator (Pet. App. 7a-8a; Tr. 43-44, 1217-1235, 1241-1243, 1264-1275). Moreover, he used money from the union's general fund to pay for personal purchases and traveling expenses to Switzerland, France, and the Virgin Islands (Pet. App. 6a; Tr. 36-37, 657-672).

1. Petitioner contends (Pet. 5-6) that 18 U.S.C. 664, making it unlawful for any person to convert employee welfare funds "to his own use or to the use of another," does not prohibit the conversion of union welfare funds to union general funds. Petitioner offers no persuasive reason to believe, however, that a union itself may not be "another" to whom the conversion of monies earmarked for specified beneficiaries is proscribed. The point of the prohibition is to preserve intact and inviolate a fund established and maintained for intended purposes and recipients, and the identity of the beneficiary of the unlawful conversion cannot make the deliberate diminution of the fund any the less criminal. As the court of appeals observed (Pet. App. 5a-6a):

> [T]he Welfare Fund was not the asset or property of the union. It belonged to participants in the Fund and their beneficiaries. Diversion of Welfare Fund assets into the union's general fund was a conversion for the benefit of the membership as a whole and differed only in degree from a diversion of such funds into the hands of a smaller group or an individual union member. The legislative history of §664 clearly indicates that its intended purpose was to preserve welfare funds for the protection of those entitled to their benefits. 1962 U.S. Code Cong. and Admin. News 1532 (H.R. Rep. No. 998). This purpose would be ill-served if such a narrow meaning were ascribed to the term "another" as to exclude the general fund of the union from its scope.

Thus petitioner's contention (Pet. 3) that none of the converted money was ever used for his personal benefit, even if true (but see Pet. App. 6a; Tr. 36-47, 657-672), is irrelevant to the question whether he converted the funds "to the use of another." Moreover, as the court of appeals observed (Pet. App. 10a), the statutory language "to his own use" does not require a showing that the misappropriation was for the personal advantage of the defendant, since any unlawful disposition of the property of another amounts to a conversion to one's "own use," which means simply "not to the use of the entruster." *United States* v. *Goad,* 490 F.2d 1158, 1165-1166 (C.A. 8), certiorari denied, 417 U.S. 945. In any event, the court of appeals correctly determined (Pet. App. 10a) that, even assuming

> that personal benefit to defendant was a requisite finding under the statute, * * * the jury could have found that [petitioner] benefited indirectly because of his status as a salaried officer and creditor of the union. Violation of the statute cannot be condoned

simply because it is accomplished by indirect means. *Cf. United States* v. *Vitale,* 489 F.2d 1367, 1370 (6th Cir. 1974).

2. As petitioner recognizes (Pet. 6), his second claim—that it cannot be a violation of 18 U.S.C. 1027 to fail to report that union welfare funds have been diverted into the union general fund—stands or falls upon the strength of his initial argument that such a diversion is itself not unlawful. For the reasons just stated, however, petitioner's conviction for conversion of welfare funds was entirely proper, and thus it follows that his conviction for falsifying the annual financial reports to conceal the unlawful act was proper as well.

3. Petitioner also complains (Pet. 6-7) of the adequacy of the authorization under 28 U.S.C. 515(a) of the Special Attorney who presented the case to the grand jury. Such a challenge to the initiation of the prosecution is required to be raised before trial. Fed. R. Crim. P. 12(b)(2); see *Davis* v. *United States,* 411 U.S. 233, 236-237. The claim is in any event without substance. Here the Special Attorney, by a commission under Section 515(a) properly authorized by the Deputy Attorney General, was directed to concern himself with violations of the "criminal laws of the United States."[1] The generality of this authorization did not invalidate either the Special Attorney's appearance before the grand jury or the presentation by him of evidence relating to the crimes of which petitioner has been convicted. *In re Subpoena of Persico,* 522 F.2d 41 (C.A. 2); *United States* v. *Wrigley,* 520 F.2d 362 (C.A. 8), certiorari denied, November 17, 1975 (No. 75-5284).

4. Contrary to petitioner's claim (Pet. 7), the court of appeals' decision has not abrogated any right that may

[1]Pet. 7; see also the government's appellate brief at 26.

exist on the part of a union official to set off from the union's general fund a debt lawfully owed by the union to him. There was no evidence in this case that petitioner was in fact drawing funds against the debt owned him, or that the amount due him was decreased as he used union funds to pay personal expenses. Rather, the evidence clearly showed that the use of union funds by petitioner was both unauthorized by the union and undisclosed by petitioner. Thus, in affirming his conviction the court of appeals has not departed "from the accepted course of judicial proceedings" (Pet. 7), and there is no occasion for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.